CRIMINAL YEAR SEMINAR

April 4, 2014 - Phoenix, Arizona
April 11, 2014 - Tucson, Arizona
April 25, 2014 - Mesa, Arizona

U.S. SUPREME COURT CASES
Cases Decided 2013-14

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SUPREME COURT OF THE UNITED STATES
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The Year of the Dog:

Florida v. Jardines, 133 S.Ct. 1409 (Mar. 26, 2013) holds that a drug sniffing dog named "Franky" conducted a "search" when an officer took him to the defendant's porch, which was "curtilage." Franky smelled pot and the officers then got a search warrant and found pot. Justice Scalia (+Thomas, Ginsburg, Sotomayor and Kagan) wrote that, under general trespass principles, the officer's entry with his drug-sniffing dog intruded on the defendant's curtilage and the entry was not "explicitly or implicitly invited." Officers can walk on the curtilage to speak to occupants (i.e. a "knock and talk"), just like a salesman or Girl Scout, but here the officer did not go the residence to speak to the occupants. Instead he took Franky up to the porch. A permissible knock-and-talk does not extend to this activity. Because of the trespass here, the majority did not address whether the defendant had a reasonable expectation of privacy.

Justice Kagan (+Justices Ginsburg and Sotomayor) agreed with the majority but also would have found that Franky and the police violated the defendant's expectation of privacy. Justice Alito (+Roberts, Kennedy, and Breyer) dissented.

Florida v. Harris, 133 S.Ct. 1050 (2013) for the first time deals with how to evaluate a dog's reliability. "Aldo" made history for being wrong two times: first, alerting for a drug he was not trained to detect and later alerting when no drugs were found. *Harris* dealt with interesting data that an average of up to 80% of dog alerts are wrong. Dipping into the "totality-of-the-circumstances" doggy bag, the Supreme Court outlines that if a bona fide organization certifies a dog after controlled testing or if a training program recently evaluated the dog's proficiency, a court can presume the dog's alert was accurate. The other side can always offer conflicting evidence on the dog.

So ends the Supreme Court Year of the Dog.

Search Warrant Detention

Bailey v. United States, 133 S.Ct 1031 (Feb. 19, 2013) clarifies *Michigan v. Summers*, 452 U.S. 692 (1981)'s holding that officers can detain incident to the execution of a search warrant. Here, Bailey and another man left an apartment before the officers

arrived to execute the warrant and the police stopped them about a mile away. Bailey first admitted he lived at the apartment, but then denied it when he found out about the search warrant. After the police discovered drugs and a gun they arrested Bailey.

Justice Kennedy noted there are three reasons justifying the seizure of a person incident to a search under *Summers*: officer safety, facilitating the completion of the search, and preventing flight. None were here. The Court did state that if the occupant had returned, he could have been detained under *Summers*.

Co-Occupants Consenting to Search

Fernandez v. California, 134 S.Ct. 1126 (2014) distinguishes *Georgia v. Randolph*, 547 U.S. 103 (2006)'s rule that a "present and objecting co-occupant" can stop a police search. Here, the police asked a female co-occupant for consent to search after they took the defendant away even though he had objected to the search earlier when he was physically present.

The key to this case is that Fernandez's removal was not a pretext to get the consent of his co-occupant. The police validly arrested him with probable cause. Thus, their removal of Fernandez was "objectively reasonable."

Specifically, the police saw Fernandez run into an apartment complex after a violent robbery. They heard screams from the apartment and knocked on the door. A battered and bleeding woman answered. Fernandez then came to the door and objected to the police search. Suspecting he had assaulted the woman, they detained him and arrested him after the original robbery victim identified him as the robber. Later, a police officer returned to the apartment and got the woman's written and oral consent to search.

Randolph had held that a co-occupant objection to a search trumped the other occupant's consent. *Fernandez* distinguishes *Randolph* because he was not present and objecting because the police had validly removed him.

The Brave New World of a Genetic Search - DNA Testing

Maryland v. King, 133 S.Ct. 1958 (2013) holds that: 1) getting DNA from a buccal swab upon arrest for a serious offense, as the Maryland DNA Collection Act allows, is reasonable under Fourth Amendment; and 2) the Fourth Amendment allows for analyzing the DNA. The minor intrusion, a cheek swab that does not break skin, does not violate a privacy expectation. Swabbing does not increase (at least not very much) the indignity of an arrest and the state's interest is significant. Justice Scalia (+Ginsburg, Sotomayor and Kagan) pens a notable dissent on the nature of society and humanity; a clarion call warning about the type of world we are creating.

The Sound of Silence

Salinas v. Texas, 133 S.Ct. 2174 (2013) holds that a prosecutor can comment at trial on an un-*Mirandized*, out-of-custody defendant's silence in the face of police questioning. Here, Salinas initially voluntarily answered questions during a murder investigation but balked when the police asked whether a ballistics test would show that the shell casings would match his shotgun. (F.Y.I. there is no "ballistics" test for shotgun shells). At Salinas's murder trial, prosecutors argued that his reaction to the officer's question showed his guilt. Salinas cried fowl under the Fifth Amendment. But, ruled the Supreme Court, because Salinas did not "expressly invoke" the privilege against self-incrimination when the police questioned him, too bad. As *Berghuis v. Thompkins*, 130 S.Ct. 2250 (2010) settled, the privilege "generally is not self-executing."

Note: It used to be simple: no commenting on a defendant's silence. Now, who knows! See the chart at the end of this outline, which I based on Neal Davis and Dick Deguerin, "Silence Is No Longer Golden: How Lawyers Must Now Advise Suspects in Light of Salinas v. Texas," *The Champion*, Jan/Feb 2014.

Rebuttal Expert re: *Mens Rea*

Kansas v. Cheever, 134 S.Ct. 596 (2013) holds that when a defense expert testifies the defendant lacked the requisite mental state to commit an offense, the Fifth Amendment does not prevent the prosecution from rebutting with its own psychiatric evidence including from a defendant's own statements. Here, Cheever argued methamphetamine addiction made him incapable of forming premeditation for first-degree murder and the Fifth Amendment privilege of self-incrimination does not bar evidence from a court-ordered mental evaluation of the defendant.

Effective Assistance of Counsel

Hinton v. Alabama, 13-6440 (2014) holds that under *Strickland v. Washington* defense counsel can be ineffective in selecting and presenting experts. A jury had convicted Hinton of murder and robbery based on ballistic evidence comparing six 38 cal. bullets with bullets from Hinton's gun. The state's experts said match but now three new well-qualified experts say no. At the original trial, the defense and trial judge did not know that Alabama had changed the statute to allow for reasonable defense experts. Incorrectly, they thought the statute only allowed $500.00 per count for a defense expert for a total of $1000. At that price, what the defense found was pathetic. The defense expert, Payne, admitted he had testified only twice as a firearms expert, that one of those cases involved a shotgun, and his real expertise was in military ordnance. He could not even operate the state forensic laboratory microscope. The clincher, though, was the prosecutor's cross regarding Payne's eyesight:

- "Q. Mr. Payne, do you have some problem with your vision?

- "A. Why, yes.
- "Q. How many eyes do you have?
- "A. One."

This definition of effective representation follows the Court's treatment of the subject in *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010) and *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

Back to Law School: Aiding/Abetting and Causation

Rosemond v. United States, 2014 WL 839184 (Mar. 5, 2014) reads like a law school exam answer on adding and abetting law. Specifically, the question was who gets blamed (and punished) for a gun that appears in a drug-buy gone bad. Resolving a Circuit split, the Court held that 18 U.S.C. § 924(c)'s punishment of using a firearm during a drug crime only applies when a person knows in advance that one of his conspirators will carry a gun. He must have time to opt out of the offense. Simple knowledge that someone used a firearm during a crime of violence or drug trafficking crime in which the defendant also participated is no longer enough.

Burrage v. United States, 134 S.Ct. 881 (Jan. 27, 2014), like *Rosemond*, takes us back to school on a causation case (anyone remember *Phalsgraf*?). Here a long time drug addict died following an extended binge that included using heroin purchased from Burrage. The question was whether Burrage was criminally liable for causing the death. The Court expounded that the statute as written plus "common sense" and rule of lenity mean that the test is "but-for" the defendant's action, would death have resulted. The government conceded that there is "no evidence that [the victim] would have lived but-for his heroin use." Also, the Court ruled that the "death results" enhancement under 18 U.S.C. § 841(b)(1)(C), which increases the defendant's minimum and maximum sentence, must be submitted to the jury and proved beyond a reasonable doubt, citing *Allevne*.

12 Men (well, People) Good and True

Alleyne v. United States, No. 11-9335 (June 17, 2013) is a game changer. Alleyne used a firearm during a crime of violence. Title 18 U. S. C. §924(c)(1)(A) provides for a 5-year mandatory minimum sentence for the firearm and a 7 year minimum sentence "if the firearm is brandished." The jury made no findings on whether Alleyne "brandished" the gun. Despite this, the Presentence report recommended a 7-year sentence for "brandishing," to which Alleyne objected citing the lack of jury finding. Alleyne got nowhere with this objection in both the District Court and 4th Circuit because of *Harris v. United States*, 536 U. S. 545 (2002)'s holding that the Sixth Amendment allows judicial fact-finding that increases a mandatory minimum sentence). But Alleyne argued on; *Apprendi v. New Jersey*, 530 U. S. 466 (2000) had held that any "facts that increase the prescribed range of penalties to which a criminal defendant is exposed" are elements of

the crime with right to jury. The Supreme Court agreed. *Holding*: "Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." Granted, judges may still find uncharged facts by a preponderance when exercising broad discretion within a statutory range. But, *Harris* is out; *Apprendi* is in.

Alleyne displays a split in the Court on how to read the Sixth Amendment. The Thomas, Ginsburg, Breyer, Sotomayor, Kagan, Breyer majority believe the Framers intended the jury as a check against all government, including unchecked prosecutorial power. The Roberts, Scalia, and Kennedy dissenters believe the Sixth Amendment's only purpose is to protect against judicial overreaching. For *Alleyne* in practice see *United States v. Cortes*, 2013 WL 5539622 (9th Cir. Oct. 9, 2013).

Is defendant's *Prearrest* silence admissible under the Fifth Amendment?

Prearrest	As Substantive Evidence	To Impeach
Pre-*Miranda* Express Invocation in Response to Police Questions	Open question, but almost surely not. *See U.S. v. Okatan*, 728 F.3d 111 (2dCir 2013).	Undecided
Pre-*Miranda* Silence in Response to Police Questioning	Yes. *Salinas v. Texas*	Yes. *See Jenkins v. Anderson*, 477 U.S. 231 (1980).
Pre-*Miranda* silence not in response to police questioning	Undecided, but almost surely yes, under *Salinas*	Yes. *Jenkins*
Post-*Miranda* silence in response to police questioning	No. *Doyle v. Ohio*, 426 U.S. 610 (1976) and progeny.	No. *Doyle*
Post-*Miranda* silence not in response to police questioning	No. *Doyle*	No. *Doyle*

***See* Neal Davis and Dick Deguerin, "Silence Is No Longer Golden: How Lawyers Must Now Advise Suspects in Light of Salinas v. Texas," *The Champion*, Jan/Feb 2014.**

Is defendant's *Postarrest* silence admissible under the Fifth Amendment?

Postarrest	As Substantive Evidence	To Impeach
Pre-*Miranda* silence in Response to Police "Statements"	Not resolved. *Compare United States v. Velarde-Gomez*, 104F.3d 377 (D.C.Cir. 1997) *with United States v. Frazier*, 408 F.3d 1102 (8th Cir. 2005)	Yes. *Greer v. Miller*, 483 U.S. 756 (1987) and *Fletcher v. Weir*, 455 U.S. 603 (1982).
Pre-*Miranda* Silence not in Response to Police Questioning	Not resolved. *Compare U.S. v. Whitehead*, 200 F.3d 634 (9th Cir. 2000) with *U.S. v. Frazier*, 408 F.3d 1101 (8th Cir. 2005) (yes).	Yes. *Greer* and *Fletcher*.
Post-*Miranda* silence in response to police questioning	No. *Miranda v. Arizona*, 384 U.S. 436 (1966).	No. *Doyle*.
Post-*Miranda* silence not in response to police questioning	No. *Doyle*.	No. *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

***See* Neal Davis and Dick Deguerin, "Silence Is No Longer Golden: How Lawyers Must Now Advise Suspects in Light of Salinas v. Texas," *The Champion*, Jan/Feb 2014.**